REVIEW ESSAY

CONSTITUTIONAL INTERPRETATION AND THE PROBLEM OF HISTORY

FEDERALISM: THE FOUNDERS' DESIGN. By Raoul Berger. Norman, Oklahoma: University of Oklahoma Press. 1987. Pp. viii, 223.

Reviewed by J.M. BALKIN*

PROLOGUE: A BICENTENNIAL VIGNETTE

Judge Bork:

> The judge's authority derives entirely from the fact that he is applying the law and not his personal values . . . .
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> . . . .
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> How should a judge go about finding the law? The only legitimate way, in my opinion, is by attempting to discern what those who made the law intended . . . .
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> . . . .
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> If a judge abandons intention as his guide, there is no law available to him and he begins to legislate a social agenda for the American people. That goes well beyond his legitimate power.
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> . . . .

Senator Biden:

> Judge Bork, I am sure you know the one question to be raised in these hearings is whether or not you are going to vote to overturn Supreme Court decisions . . . .
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> . . . .
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> Would you be willing for this Committee to identify the dozens of cases that you think should be reconsidered?

Judge Bork:

> . . . .
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> [T]he enormous expansion of the commerce power . . . Congress's power under the commerce clause of the Constitution, is settled and it is simply too late to go back and reconsider that even though it appears to be much broader than anything the Framers or the ratifiers intended.

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> So there is, in fact, a recognition on my part that stare decisis, the theory of precedent, is important. In fact, I would say to you that anybody who believes in original intention as the means of interpreting the Constitution has to have a theory of precedent, because this Nation has grown in ways that do not comport with the intentions of the people who wrote the Constitution—the commerce clause is one example—and it is simply too late to go back and tear that up.
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> I cite to you the legal tender cases. These are extreme examples admittedly. Scholarship suggests that the Framers intended to prohibit paper money. Any judge who today thought he would go back to original intent really ought to be accompanied by a guardian rather than be sitting on a bench.[1]

I

A PROPHET IN HIS OWN COUNTRY

Modern constitutional theory faces a problem of history: to what degree can historical events ever alter the proper interpretation of the Constitution? Yet if history creates a problem, Raoul Berger has always claimed it is our problem, not his. During the last few decades, Berger has produced scores of books and articles, all directed towards his abiding passion—elucidating the original intentions of the Framers and Ratifiers of our Constitution, which, he argues, provide the only legitimate standard for constitutional interpretation. In his latest work, *Federalism: The Founders' Design (Federalism)*,[2] Berger considers the allocation of state and federal authority found in the tenth amendment, the taxing and spending clause, and the commerce clause. Not surprisingly, he finds that the Supreme Court has travelled far from his own interpretation of the Framers' intent.

Throughout his long career, Berger has insisted that he has not been influenced, either in reasoning or conclusions, by his political views. As he notes in *Federalism*:

> States' Rights . . . were for long associated in my mind with Southern condonation of lynchings, with official oppression of blacks, and with demagogues who duped their constituents. My interest arose . . . out of sheer intellectual curiosity, and my conclusions not infrequently are at war with my predilections. For the task of the historian, as Ranke enjoined, is to tell it as it was, no matter how far current thinking has departed from that of the Founders.[3]

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[1] The Supreme Court Nominee's Record Examined: Bork Faces Tough Questions on Privacy and Equal Rights, 45 Cong. Q. Weekly Rep. 2258-59 (Sept. 19, 1987) (transcript of Bork confirmation hearings) [hereinafter Bork Hearings].

[2] R. Berger, Federalism: The Founders' Design (1987).

[3] Id. at 5.

What has changed over time is the reception that Berger has received from various academics. Although his early article on *Bridges v. California* [4] is an exception,[5] in general his writing before 1977 has pleased liberals and his writing after 1977 has been applauded by conservatives. The explanation has much to do with his choice of subject matter. His books and articles before 1977 served to rebut the Nixon administration's views about executive privilege and impeachment,[6] defended the doctrine of judicial review,[7] and criticized restrictive standing doctrines.[8] These works made Berger the darling of liberal scholars who took great delight in the possibility of defending liberal doctrines through the traditionally conservative principle of original intention.

All of this changed with the publication of Berger's 1977 book on the fourteenth amendment, *Government by Judiciary*,[9] in which he argued that the fourteenth amendment was designed neither to end the segregation of public schools nor to protect the integrity of suffrage. Berger was met with a host of attacks on both his historical accuracy and his politics,[10] and it is unclear which offended him more. In any case, he responded with equal vehemence,[11] and these replies witnessed an in-

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[4] 314 U.S. 252 (1941).

[5] See Berger, Constructive Contempt: A Post-Mortem, 9 U. Chi. L. Rev. 602 (1942) ("[L]iberal justices employ a discredited technique in the *Bridges* case in order to read *their* predilections into the Constitution.").

[6] See R. Berger, Executive Privilege: A Constitutional Myth (1974); R. Berger, Impeachment: The Constitutional Problems (1973).

[7] See R. Berger, Congress v. The Supreme Court (1969). Berger was careful to note, however, that this work defended only the power, rather than the current scope of judicial review. Id. at 338.

[8] See Berger, Standing to Sue in Public Actions: Is It a Constitutional Requirement?, 78 Yale L.J. 816 (1969).

[9] See R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (1977).

[10] See, e.g., Dimond, Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds, 80 Mich. L. Rev. 462, 463 & n.7 (1982) (describing reviews critical of Berger); Gibbons, Book Review, 31 Rutgers L. Rev. 839, 845 (1978) (labelling Berger's history "a narrow, confused, partisan example of special pleading"); Lynch, Book Review, 63 Cornell L. Rev. 1091, 1092 (1978) (describing Berger's position as "extreme" and his analyses as often "exaggerating the apparent weight of the evidence"); McAffee, Berger v. The Supreme Court—The Implications of His Exceptions Clause Odyssey, 9 U. Dayton L. Rev. 219, 234-35, 272 (1984) (Berger's historical analysis slanted by his personal biases).

[11] See, e.g., Berger, Paul Dimond Fails to "Meet Raoul Berger on Interpretivist Grounds," 43 Ohio St. L.J. 285 (1982) [hereinafter Fails to Meet]; Berger, "Government by Judiciary": Judge Gibbons' Argument Ad Hominem, 59 B.U.L. Rev. 783 (1979) [hereinafter Argument Ad Hominem]; Berger, A Study of Youthful Omniscience: Gerald Lynch on Judicial Review, 36 Ark. L. Rev. 215 (1982) [hereinafter Youthful Omniscience]; Berger, McAffee v. Berger: A Youthful Debunker's Rampage, 22 Willamette L. Rev. 1 (1986) [hereinafter Debunker's Rampage]. To paraphrase Richard Saphire, if responding to Berger's thesis has become somewhat of a cottage industry in constitutional scholarship, issuing responses to his critics has become somewhat of a cottage industry for Berger himself. See Saphire, Judicial Review in the Name

creasing stridency in his otherwise stylish prose that has not yet abated. Berger followed *Government by Judiciary* with articles criticizing the constitutionalization of the right to travel[12] and the use of the ninth amendment to justify substantive due process decisions.[13] Next, he produced a ringing indictment of the Supreme Court's death penalty cases,[14] arguing that original intent supported the constitutionality of the death penalty, and excoriating the Court for making it so difficult for executions to take place. This brought another round of critical reviews,[15] which were returned in kind.[16] It is unlikely that the present book, which defends a narrow conception of federal power and calls for a reversal of modern commerce clause jurisprudence, will make Berger's more liberal critics any happier.

Berger's sharp break in choice of subject matter before and after 1977 is intriguing, and it may be possible that despite his disclaimers, the choice reflects an increasing frustration with modern American liberalism.[17] After all, one tends to write about what interests one most, and what has always interested Berger most is how the Supreme Court has gotten it wrong. Remarks scattered throughout *Federalism* suggest that this work was inspired to some degree by Berger's dissatisfaction with the Supreme Court's 1985 decision in *Garcia v. San Antonio Metropolitan Transit Authority*,[18] in which the Court ended its flirtation with a rehabilitated tenth amendment.[19] This book is certain to be praised by opponents of that decision, although, as I point out below, virtually no one would be willing to accept Berger's theory of why the case is wrongly

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of the Constitution, 8 U. Dayton L. Rev. 745, 753 (1983).

12 Berger, Residence Requirements for Welfare and Voting: A Post-Mortem, 42 Ohio St. L.J. 853 (1981).

13 Berger, The Ninth Amendment, 66 Cornell L. Rev. 1 (1980); see also Berger, "Law of the Land" Reconsidered, 74 Nw. U.L. Rev. 1 (1979) (arguing that law of the land clauses and their successors, the due process clauses, were not intended to permit judicial review of legislation for reasonableness).

14 R. Berger, Death Penalties: The Supreme Court's Obstacle Course (1982).

15 See, e.g., Bedau, Berger's Defense of the Death Penalty: How Not to Read the Constitution, 81 Mich. L. Rev. 1152 (1983); Richards, Constitutional Interpetation, History, and the Death Penalty: A Book Review, 71 Calif. L. Rev. 1372 (1983); White, Judicial Activism and the Identity of the Legal Profession, 67 Judicature 246 (1983).

16 See, e.g., Berger, Death Penalties and Hugo Bedau: A Crusading Philosopher Goes Overboard, 45 Ohio St. L.J. 863 (1984); Berger, A Response to D.A.J. Richards's Defense of Freewheeling Constitutional Adjudication, 59 Ind. L.J. 339 (1984); Berger, G. Edward White's Apology for Judicial Activism, 63 Tex. L. Rev. 367 (1984).

17 See, e.g., Berger, Michael Perry's Functional Justification for Judicial Activism, 8 U. Dayton L. Rev. 465, 487-88 (1983) (noting lack of public acceptance of judicial activist decisions concerning death penalty, pornography, school prayer, and affirmative action).

18 469 U.S. 528 (1985).

19 See, e.g., R. Berger, supra note 2, at 165 (*Garcia* "is a glaring departure from the established course, and it places the states at the mercy of Congress, precisely what the Founders meant to avoid").

decided.[20]

In reading Berger's work it is always important to distinguish Berger the historian from Berger the constitutional theorist and philosopher of history, even though Berger would probably consider all of these facets of his work as intimately related. Critics may tend to overlook these distinctions because Berger himself tends to overlook them. Nevertheless, such distinctions are crucial to assessing the importance of his contributions to American constitutional law; one can express genuine admiration for some aspects of his work while having serious reservations about others. Although I do not agree with Berger's theory of constitutional interpretation, I often find myself agreeing with his history. This book is no exception. In this Review Essay I shall have some minor criticisms of his historical conclusions, but for the most part I am interested in Berger's view of the relevance of history to constitutional interpretation. This is a subject that has not changed much in Berger's work over the years, and in a sense it is the subject of all of his work.

II
THE ARGUMENT OF THE BOOK

A. Berger's Theory of Federalism

One would hardly recognize modern commerce clause doctrine from the picture that Berger paints of the intentions of the Founders. For example, Berger argues that Chief Justice Marshall was incorrect in *Gibbons v. Ogden*[21] when he stated that commerce meant more than traffic in goods and extended to " 'every species of commercial inter-

[20] See text accompanying notes 48-52 infra. Nevertheless, the remarkable thing about a theory of original intention is that if pursued diligently enough, it eventually winds up infuriating almost everyone. Berger's academic reputation might easily suffer an about face again if he continues his investigations into federalism and writes his next book about the eleventh amendment. In recent years, the Supreme Court has manipulated the eleventh amendment to curtail civil rights suits brought by citizens suing their own state, despite the weight of scholarly authority that indicates that the eleventh amendment forbids only what its language explicitly reaches: all suits in law and equity by citizens of one state against another state. See Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1473-84 (1987); Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum. L. Rev. 1889, 1936-37, 2004 (1983); cf. R. Berger, supra note 7, at 324-28 ("[I]t is a perversion of the Eleventh Amendment . . . to read it so as to deprive people of access to the courts which were to be the guardians of their constitutional rights.").

Perhaps Berger will become as incensed by Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 117 (1984), and Edelman v. Jordan, 415 U.S. 651, 669, 671-78 (1974), as he has in *Federalism* by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), and Wickard v. Filburn, 317 U.S. 111, 125, 128-29 (1942). If he does so, he may yet again become a liberal hero, although if one is to believe his writings, this will make hardly any difference to Berger himself.

[21] 22 U.S. (9 Wheat.) 1 (1824).

course.' "[22] Berger claims that "[t]he great domestic evil which, with foreign commerce, was the source of the clause, was the States' erection of obstacles against the passage of goods from one State to another."[23] Thus, Berger rejects Marshall's construction of the words "commerce among the states" as "commerce that is intermingled with the states,"[24] for it would support Marshall's argument that " '[c]ommerce among the States cannot stop at the external boundary lines of each State, but may be introduced into the interior.' "[25]

Instead, Berger argues that the correct construction of "among" is "between," so that Congress is only empowered to regulate commerce of the states with each other.[26] This is because "the all but exclusive concern of the Founders was exactions by States from their neighbors."[27] "We are therefore justified," he concludes, "in confining interstate commerce to the mischief it was meant to remedy—internecine exactions."[28]

Behind these interpretative moves is a more general theory of federal-state relations that Berger believes underlies the Constitution. It is most clearly stated by Madison, who argued in Federalist No. 39 that the federal government's power "extends to certain enumerated objects only, and leaves to the Several States a residuary and *inviolable* sovereignty *over all other objects*."[29] According to Berger, among those retained powers was the police power of the states over their local affairs.[30] Purely internal matters were reserved to the states, and the federal government had no power to interfere in them.

In reaching this conclusion, of course, Berger has to favor the intentions of the Ratifiers over those of the Framers. As Berger himself notes, the Constitutional Convention twice voted down Roger Sherman's proposal that the federal government may not "interfere with the Government of the individual States in any matters of internal police which respect the Govt. [sic] of such States only, and wherein the General welfare of the United States is not concerned."[31] Nevertheless, Berger ar-

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22 R. Berger, supra note 2, at 124 (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 193).

23 Id. at 125.

24 See id. at 126 (citing *Gibbons*, 22 U.S. (9 Wheat.) at 194).

25 Id. (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 194).

26 Id. at 126. Berger bases this conclusion on the original language of the New Jersey Plan, which spoke of the regulation of the trade of the States "with each other," id. (quoting 1 Records of the Federal Convention 243 (M. Farrand ed. 1966)), and which was altered by the Committee on Detail to commerce "among the several States." Id.

27 Id. at 128.

28 Id. at 132.

29 Id. at 60 (quoting The Federalist No. 39, at 249 (J. Madison) (Mod. Lib. ed. 1937)) (emphasis added by Berger).

30 Id. at 66-70.

31 Id. at 67-68 (citing 2 The Records of the Federal Convention of 1787, at 25, 630 (M. Farrand ed. 1911)).

gues, "when the Framers emerged from the secrecy of the Convention and were exposed to the sharp winds of public opinion, they reversed course."[32] Clearly Berger believes that the assurances received by the state ratifying conventions that the federal government would not interfere with the states' purely internal affairs[33] trump any understandings the Framers had in Philadelphia.[34]

Nevertheless, the Ratifiers' reservation of "purely local" matters to the states cuts both ways. A loose constructionist,[35] perhaps anticipating Chief Justice Marshall's opinion in *Gibbons v. Ogden*,[36] might cheerfully concede that "purely local" subjects were reserved to the states, but disagree with a strict constructionist's definition of what is "purely local."[37] Recognizing this possible ambiguity, Berger attempts to clarify the understanding of what powers were reserved to the states. He relies upon James Wilson's statement that

> [w]hatever object of government *is confined* in its operation and effect, *within the bounds* of a particular state, should be considered as belonging to the government of that state; whatever object of government extends, in its operation or effects, *beyond the bounds* of a particular state, should be considered as belonging to the government of the United States.[38]

However, even here, Berger's argument for a narrow construction of federal power cuts both ways. A loose constructionist would rely upon the words "in operation and effect," arguing that objects of government which have interstate *effects* are not purely internal to the state. Indeed, Berger's interpretation, if anything, tends to distort the meaning of Wilson's remarks. Their concern is not that the *object* of the governmental regulation be confined within a state's boundaries, but that its *operations and effects* should be so restricted. Thus, according to a loose constructionist, it would be irrelevant that a school janitor (to use Berger's favorite example) works for his wages totally within a given locality if one could prove that wage regulation of public school janitors had economic

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32 Id. at 68.

33 See, e.g., note 29 and accompanying text supra (statement of Madison regarding reach of federal power).

34 See R. Berger, supra note 2, at 66-76.

35 By "loose constructionist," I mean those persons in the Antebellum era (primarily nationalists like the early Federalists, the National Republicans, and the Northern Whigs), who argued for a broad construction of federal powers to regulate commerce, build internal improvements, establish a national bank, and so on. By "strict constructionist," I mean those persons (generally localists or states' rights advocates like the Jeffersonians, the later Federalists, and the Democratic Republicans) who took a narrow view of federal power.

36 22 U.S. (9 Wheat.) 1 (1824).

37 See R. Berger, supra note 2, at 71.

38 Id. (quoting 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 424 (J. Elliot 2d ed. 1836)) (emphasis in Elliot).

effects that cross state boundaries. This reading is not too far from Chief Justice Marshall's opinion in *Gibbons v. Ogden*,[39] or even from *NLRB v. Jones & Laughlin Steel Corp.*[40]

Berger, of course, rejects such conclusions. He relies, and I think correctly, upon the Founders' assumption that one can distinguish purely local issues from national ones without making question-begging claims about effects.[41] It is, to be sure, a distinction that we now find difficult to make, but it was very real to the Founders and in searching for their concrete intentions[42] Berger is not to be deterred by modern economic conditions.[43] Thus, under Berger's interpretation, "purely internal" matters include anything local in *character*; and anything which is local in character is *a fortiori* local in effect.[44] Such local matters include regulation of morals and social welfare within the state's borders.[45] It follows

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[39] 22 U.S. (9 Wheat.) 1 (1824); see text accompanying notes 21-25 supra. (brief analysis of Marshall's opinion).

[40] 301 U.S. 1 (1937) (upholding National Labor Relations Act of 1935 on grounds that labor disruption, even if wholly intrastate, would have interstate economic effects). Lest I be misunderstood, I do not think that anyone living in 1800 would have dreamed that the federal commerce power would be extended as far as it was in *Jones & Laughlin Steel*. Rather, my point is that the loose constructionist's pragmatic or empirical inquiry into interstate effects is consistent with the general approach taken in this decision.

[41] See R. Berger, supra note 2, at 71-76.

[42] By "concrete" intentions, I mean more or less specific legal and factual conclusions of the Framers—for example, that the death penalty is not cruel and unusual punishment, that agriculture is an inherently local subject of regulation, and that strict liability for libel does not violate the first amendment's guarantee of free speech. In contrast to concrete intentions, one might look to the Framers' "abstract" or general intentions. For example, one might claim that the general or abstract intention behind the fourteenth amendment's equal protection clause was to enforce a general commitment to social and political equality. This might differ greatly from its Framers' concrete intentions that heightened scrutiny should apply only to governmental discrimination based upon race, and even then not to cases of segregated public schooling. For further discussion of this distinction, see Brest, The Misconceived Question for the Original Understanding, 60 B.U.L. Rev. 204, 216-17 (1980); Dworkin, The Forum of Principle, 56 N.Y.U. L. Rev. 469, 482-500 (1981). Of course, in practice, what is relatively concrete or relatively abstract is itself a matter of interpretation. Berger, however, believes that the distinction is real enough. He has made it clear that he has no use for a theory of abstract intentions:

> When a judge ascends to high levels of generality, he 'creates a concept without limits . . . thus ensuring erratic judicial enforcement.' . . . Worse, that judge violates the Founders' rejection of illimitable power. Aware of the greedy expansiveness of power, the Founders labored to define and limit what power they delegated . . . . Ascending the ladder of generality obliterates those limits.

Berger, Some Reflections on Interpretivism, 55 Geo. Wash. L. Rev. 1, 7 (1986) (quoting Bork, Forward to G. McDowell, The Constitution and Contemporary Constitutional Theory at x (1985)).

[43] See, e.g., R. Berger, supra note 2, at 124 ("Economic expansion cannot alter the meaning the constitutional terms had for the Founders.").

[44] See id. at 72 (objects delegated to federal government concern "money—not morals or social welfare").

[45] See id. at 145-46.

that anything within a state's police power is internal in nature and hence exclusively within the state's power to regulate.[46] As Berger explains:

> A State's regulation of its schools, hospitals, jails, and the like ordinarily has no "effect" beyond its borders, and . . . it remains the domain of the State. Once, therefore, a particular function is identified as "local" as understood by the Founders—e.g., "agriculture"—it is protected by the State's "exclusive" jurisdiction of such matters.[47]

The placement of the word "effect" in quotation marks is not accidental. Berger's definition of "local functions" requires him to claim that certain economic effects on the national economy produced by local subjects of regulation are not really effects at all, or at least are not effects for purposes of the commerce clause. For example, agriculture and manufacturing cannot affect the national economy because they are local in nature, and local matters do not have interstate effects.

This formalistic—and admittedly circular—style of reasoning clearly underlies Berger's treatment of *Garcia v. San Antonio Metropolitan Transit Authority*,[48] in which Berger argues that the dissenters were right, albeit for the wrong reasons. Berger derides the traditional governmental functions test of *National League of Cities v. Usery*[49] as the Court's "timorous response to the compulsions of the Tenth Amendment."[50] He argues that "[o]f course, mass transit was not a 'traditional governmental function'; there was no need for it in the eighteenth century towns and villages."[51] Indeed, according to Berger's logic, if the tenth amendment prevented federal interference with traditional state functions, the most traditional state function of all was the state's power to police the health, safety, and welfare of its citizens. However, not even the most conservative of the Justices was prepared to hold that the tenth amendment offered immunity from federal regulations affecting only private parties. Such reasoning would have returned the Court to results reached in cases like *Hammer v. Dagenhart*.[52] Ironically, then, Berger offers modern states' rights conservatives a rationale for overturning *Garcia* that none would be likely to accept.

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[46] Id. at 70 n.109.

[47] Id. at 75.

[48] 469 U.S. 528 (1985) (overruling National League of Cities v. Usery, 426 U.S. 833 (1976)).

[49] 426 U.S. 833 (1976) (holding that tenth amendment precludes congressional regulation of interstate commerce where such regulation would intrude upon traditional governmental functions of states).

[50] R. Berger, supra note 2, at 167.

[51] Id.

[52] 247 U.S. 251 (1918) (striking down congressional prohibition of shipment in interstate commerce of goods produced by child labor). For a more detailed treatment of this problem in *Garcia*, see Balkin, Ideology and Counter-Ideology From Lochner to Garcia, 54 UMKC L. Rev. 175, 203-04 (1986).

Nevertheless, according to Berger, the real problem with the federal regulation of mass transit in *Garcia* was not that the mass transit system was run by a municipality, but that it was purely local. Had the system been privately owned, it would have been equally beyond the federal government's regulatory powers because the system's lines did not cross the boundaries of the state of Texas.[53]

In order to make this argument work, Berger must dismiss the claim of the *Shreveport Rate Case* [54] that intrastate transportation could come within the ambit of federal power because of its effects on interstate commerce.[55] However, he is quite willing to bite this logical bullet: "Manifestly," he concludes, "mass transportation from 42d Street to 72d Street has no effect 'beyond the bounds' of New York City, and therefore it does not 'affect' interstate commerce."[56] Of course, even when making such seemingly outrageous claims, Berger is well aware that intrastate activities can almost always be shown to have interstate effects, if one uses the word "effect" in anything close to its everyday sense.[57] The conclusion to be drawn from this, he thinks, is not that we should abide by common sense meanings, but that such " '[e]ffects' cannot be given unlimited scope without violating the Founders' determination to withhold illimitable power."[58] The local/national distinction, which Berger sees as fundamental to the Founders' intentions, simply cannot survive if we take an empirical approach to the question of interstate versus intrastate effects. If the Founders' intentions are to be respected above all, our commitment to modern understandings of economic cause and effect must bow to our commitment to constitutional legitimacy.

Yet Berger's attempt at a semantic solution merely demonstrates the difficulty with present day reliance on the concrete intentions of the

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[53] See R. Berger, supra note 2, at 170 ("San Antonio had not claimed immunity from federal regulation 'on the ground that it is a local transit system engaged in intrastate commercial activity.' But the jurisdictional boundary issue stared the Court in the face and could not, in good conscience, be ducked." (quoting *Garcia*, 469 U.S. 528, 537 (1985))).

[54] Houston, E. & W. Tex. Ry. Co. v. United States (Shreveport Rate Case), 234 U.S. 342 (1914).

[55] See id. at 358-59.

[56] R. Berger, supra note 2, at 170. One wonders if Berger has ever tried to get from the Connecticut suburbs of New York City to Wall Street by way of Grand Central Station and gotten stuck on the IRT subway line going downtown. Believe me, interstate commerce is affected when a bunch of sweating pinstriped yuppies are prevented from getting to their law firms, brokerage houses, and accounting offices by a transportation system that was probably invented by the Marquis de Sade. Given the lost time and foul tempers regularly spawned by that subway from hell, and given the distribution of business interests at the base of Manhattan Island, I'd wager that the efficiency of the number 4 and 5 IRT lines has more to do with the health of the American economy than your average automobile factory and steel plant put together.

[57] See R. Berger, supra note 2, at 120-21, 170.

[58] See id. at 170.

Founders. The distinction between local and national subjects of regulation, while fuzzy even at the time of the Framers, at least made some economic sense in 1787. Within only a few decades, however, the original understanding proved seriously naive. In response, the Supreme Court attempted to preserve this understanding by adopting formal distinctions such as local versus national, direct versus indirect effects, or manufacturing versus commerce. Thus, it is no accident that when Berger attempts to give content to the Framers' intention to preserve the police power of the state inviolate, he sounds remarkably like the Justices of the *Lochner* era[59] who had to grapple with the same problems:

> State control over janitors of its schools or hospitals is incontrovertibly "local," as is transportation of people solely within town confines, having no effect on "interstate" transportation. The "local" test is that of the Founders, and it is far more tangible and soundly based than [the doctrines announced in *Garcia*].[60]

Elsewhere Berger argues that

> [p]ressed to its logical conclusion, . . . [the] reasoning [that everything is immediately or remotely related to every other thing] collides with the Founders' categorical rejection of unlimited federal power and their unyielding resolve to retain State control over internal matters.[61]

Indeed, Berger follows the second passage with a quotation from Justice Lamar's opinion in *Kidd v. Pearson*,[62] a late nineteenth century case that created the manufacturing/commerce distinction that figured so prominently in the *Lochner* period. As Justice Lamar and his successors realized, a more candid recognition of economic realities would de-

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[59] For a discussion of the *Lochner* era see Balkin, supra note 52, at 178-86; Balkin, Federalism and the Conservative Ideology, 19 Urb. Law. 459, 477-87 (1987).

[60] R. Berger, supra note 2, at 176.

[61] Id. at 121. Compare the Supreme Court's language in Carter v. Carter Coal Co.:

> Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices; and it is insisted that interstate commerce is *greatly* affected thereby. But . . . the conclusive answer is that the evils are all local evils over which the federal government has no legislative control. The relation of employer and employee is a local relation. . . . And the controversies and evils, which it is the object of the act to regulate and minimize, are local controversies and evils affecting local work undertaken to accomplish the local result. Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character.

298 U.S. 238, 308-09 (1936).

[62] 128 U.S. 1, 20-21 (1888) (upholding Iowa state law prohibiting manufacture of intoxicating beverages by an Iowa distillery where output was sold out of state). Although *Kidd* involved a dormant commerce clause challenge to a state law, its distinction between manufacturing and commerce was later used to limit federal regulatory power. See, e.g., United States v. E.C. Knight Co., 156 U.S. 1, 14, 16 (1895) (holding that manufacturing was not commerce and therefore was not subject to federal antitrust regulation).

feat the Framers' desire to protect state police power from federal intrusion. Thus, Berger is driven to embrace the same formalistic distinctions that ultimately unravelled in the 1930s.

The conclusion to draw from this resurrection of discredited jurisprudence is not that either Berger or the *Lochner* era Justices were unimaginative scholars, but rather that the Founders' simultaneous desires to preserve state police power and to provide for federal regulation of commercial matters that the states were incompetent to deal with individually, were on a collision course from the beginning. The irremediable conflict between these two desires only became manifest many years after the document was ratified, even though Madison clearly saw a tension early on.[63] For Berger, as for the Justices of the *Lochner* era, the only solution to this conflict was a retreat into formalism. Confronted with the difficulty that traditionally local subjects of regulation necessarily affected interstate commerce one was left with few alternatives. One could ignore the difficulty and simply deny that such effects existed—as Berger appears to do in this book—or when pressed, move to the position that such effects did not count because they were remote or indirect.[64] Finally, one could assert as a matter of definition that certain matters, like manufacturing, did not constitute commerce.[65]

We may be tempted to criticize such formalistic solutions for attempting to define the problem out of existence. However, they are best seen as intellectually necessary methods for grappling with an irreducible tension immanent in the structure of the Constitution itself. Thus, one should not be surprised at Berger's adoption of *Lochner* era's solution to the inconsistent desires of the Founders. Rather, his very arguments demonstrate the inevitability of the conflict and the natural move to formalist solutions to reduce the tension.[66]

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[63] See R. Berger, supra note 2, at 121.

[64] The Court followed this latter approach in Schecter Poultry Co. v. United States, 295 U.S. 495, 546-47 (1935).

[65] See *E.C. Knight Co.*, 156 U.S. at 12-13.

[66] Of course, nineteenth century formalism provided a superficial resolution of the crisis only at the cost of engendering *sub rosa* manipulation of doctrine by judges and long term jurisprudential instability. The Roosevelt Court's solution to the problem after 1937 was to abandon formalism and ally itself with one side of the irreducible opposition. In so doing the Court made prophets of the Anti-Federalists who argued, under the guise of eighteenth century political theory, that two sovereigns could not coexist in the same polity and that the federal power would ultimately come to swallow up state sovereignty.

In fact, the Anti-Federalists were right, but for the wrong reasons. Federal regulatory power grew not because of the ineluctable nature of political power but because of the inexorable demands of economic interdependence in a national economy. The Anti-Federalists' political theory predicted that the states would lose their political identity; in fact, the states lost only their regulatory supremacy. Thus, the federal government has become supreme in economic regulation of health, safety, and welfare, while the states have retained their political identity and are still entrusted with the regulation of many everyday concerns of their citi-

B. *The Contested Nature of Federalism Claims*

I shall not dwell much on the shortcomings of Berger's historical analysis, for two reasons. First, that task has already been admirably performed by others.[67] Second, even granting the force of these criticisms, Berger's major historical point—that the Framers believed in a workable distinction between local and national subjects of regulation—remains substantially correct. Nevertheless, I do have a few minor points of disagreement with Berger's history that are relevant to my larger concern: Berger's interpretive theory.

Throughout the book, Berger assumes a considerable degree of consensus about the meaning of the Constitution at the time of its adoption. In particular, Berger much prefers Jefferson's philosophy of strict construction to Hamilton's philosophy of loose construction,[68] and he is tempted to conclude that nationalists like Hamilton and Story were out of the mainstream of constitutional understanding.[69] This is especially apparent in Berger's argument that Hamilton's construction of the general welfare clause[70] is inconsistent with the real intentions of the Framers, which were much closer to Jefferson's views.[71] Given that Hamilton was present throughout much of the Philadelphia Convention and helped write the major defense of the Constitution during the ratification debates, one wonders how he could have gotten it so wrong. Berger's answer is simple: Hamilton was a scoundrel.[72]

The matter, however, is more complicated than that. Throughout the book Berger neglects the possibility that the Ratifiers' intentions on the issue of federal-state relations could have been equivocal, or that there might have been a variety of differing intentions which supported the general language of the Constitution. Indeed, this seems a much better description of political reality. No issue was more hotly contested, both in the convention and in the ratification debates, than the relative powers of the states and the federal government.[73] The Constitution of 1787 was an agreement written in general terms acceptable to a broad

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zenry, such as marriage, adoption, inheritance, insurance, and real property.

67 See, e.g., Powell, The Modern Misunderstanding of Original Intent (Book Review), 54 U. Chi. L. Rev. 1513 (1987).

68 Compare R. Berger, supra note 2, at 115-16 with id. at 107-10.

69 See id. at 107-17.

70 Hamilton argued that the enumeration of specific powers in Article I, § 8 following the general welfare clause was not meant to confine federal spending to these areas. See 3 Works of Alexander Hamilton 372 (Lodge ed. 1985). With some modifications, this is the construction used by the Court today. See, e.g., United States v. Butler, 291 U.S. 1, 65 (1936).

71 R. Berger, supra note 2, at 100-19.

72 According to Berger, Hamilton "turned his back on the representations made to the Ratifiers," id. at 107, and tried "to secure by 'interpretation' what the Convention had rejected." Id. at 108.

73 See, e.g., Wright, Introduction, in The Federalist 2-3 (B. Wright ed. 1961).

spectrum of opinions about federal-state relations. It had to be so written because it had to command the support of centralists and localists alike. It was a compromise that a majority of the Ratifiers could live with, but we must not forget that for the nationalists and states' rights advocates, the sense of what had been compromised was very different. The two sides would fight out the actual meaning of their agreement later on. Berger's mistake is in assuming that the understandings of the Constitution by the most ardent nationalists (like Hamilton) were foreclosed by their acceptance of its ratification. However, this is an argument that cuts both ways: we may well ask why the localists' understandings were not foreclosed by their acceptance of the new Constitution.

For me, it is highly significant that the debate between Jefferson and Hamilton about constitutional construction began nearly as soon as the ink was dry on the last state resolution of ratification. My point is that this was no accident, or an exercise of bad faith on anyone's part. Rather, it was a necessary consequence of adopting a document that had to please persons of fundamentally different political views. Given the crucial ambiguities necessary to ratify the Constitution in the first place, it would have been surprising if the issue of federal and state power had not immediately surfaced in almost every significant political controversy facing the new nation. Thus, I think Berger's characterization of the Founders' intention would be more convincing if he abandoned his insistence on discovering a univocal intention, and recognized the essentially contested character of federal-state power that existed even at the moment of ratification.[74]

Lest I be misunderstood in these critical remarks, I want to emphasize that these are relatively minor points of disagreement with Berger's historical conclusions. Even if one accepts my contention that there was a wide spectrum of positions on federalism, with Jefferson on one end

[74] Berger's criticism of Hamilton also reflects his ahistorical view of interpretive theory. Berger is critical of Hamilton's statement that understandings at the Philadelphia Convention were irrelevant because "whatever may have been the intention of the framers of a constitution, or of a law . . . that intention is to be sought in the instrument itself . . . ." Id. at 110 (quoting 8 Papers of Alexander Hamilton 111 (1965)). Berger believes that these remarks are a disingenuous attempt to avoid accepting an expression of legislative intention that Hamilton witnessed with his own eyes at Philadelphia. However, Hamilton's statements about interpretive theory are perfectly consistent with the contemporary hermeneutical practices. As H. Jefferson Powell points out, at the end of the eighteenth century the "intention" behind a document was that purpose constructed from a reading of the text itself. See Powell, supra note 67, at 1513-19. Thus, Berger's ascription of the basest of motives to Hamilton is due to his assumption that the modern theory of intention is also the eighteenth century theory. Indeed, if Berger were correct, Hamilton would not be the only villain of the piece; we would also have to assume bad faith on the part of those Framers and Ratifiers who sat in Congress and voted for the bank bill, as well as bad faith on the part of the presiding officer at the Convention, George Washington, who as President signed the bill into law. Id. at 1543 n.113.

and Hamilton on the other, Berger's main points about federalism, and especially about the commerce clause, remain intact. The degree of federal intrusion into the states' police powers today is much greater than even the most ardent nationalist living in 1787 would have imagined. Even Hamilton, Marshall, and Story, in their most unbridled assertions of national power, would not have contended that the Constitution created the equivalent of a general federal police power whose operation could displace virtually any contrary state economic policy at will. Thus, Berger's major thesis remains indisputable—as far as federal-state relations are concerned, we have indeed come a long way from the original concrete intentions of the Framers and Ratifiers of the Constitution.

III

THE THEORY OF CONSTITUTIONAL INTERPRETATION

The founding fathers never envisioned that our nation would need or even attempt the degree of economic regulation that it engages in today. The modern administrative state, and the concomitant federal economic regulation that touches virtually every aspect of our lives, were far beyond the imagination of a country that in 1787 still derived most of its wealth from agriculture. The industrial revolution made the states economically interdependent in a way the Framers and Ratifiers never could have dreamed; the Civil War cemented our political interdependence with blood. Since 1787, we have not only moved to an industrial economy, but have begun a further transformation into a post-industrial service and information oriented economy.

The Framers designed a suit of clothes for a geographically isolated, pre-industrial economy. They are clothes that no longer fit; indeed, they began to burst at the seams even as the Constitution was ratified. Yet, Berger argues, if we are dissatisfied, we cannot turn to the judiciary to make new garments for us; we must make them for ourselves through the amendment provisions of Article V.[75] Of course, this is not a claim about history at all; it is a claim about the proper standards of constitutional interpretation. Berger's discussion of interpretive theory is by far the weakest aspect of *Federalism*, and it is the primary concern of the remainder of this Essay.

It is admittedly difficult to embrace a theory of constitutional interpretation, which, if accepted, would dictate the unconstitutionality of almost all federal civil rights, securities, antitrust, food and drug, and health and safety laws. The expanded powers of the federal government under the commerce and spending clauses since the New Deal have be-

[75] R. Berger, supra note 2, at 189.

come so much a part of our lives that the consequences of a narrowed conception along the lines Berger suggests would simply be disastrous. However, Berger's demand that we hew to original intention is not based upon mean-spiritedness or lack of vision. It stems from a deeply held commitment to the Rule of Law that one can find expressed in almost all of his work:

> A search for the "original intention" is faithful to "the rule of law," a central tenet of our democratic system. That rule . . . postulates that "we are all to be governed by the same preestablished rules and not by the whim of those charged with executing those rules." It was a common assumption of the Founders that those who govern must do so "in accordance with a known, settled, standing law." They wanted no personal justice administered after the fashion of the Caliph Haroun-al-Rashid, under the shade of a tree, no conjuring of rules from a crystal ball, but rather the administration of known laws with an absolute minimum of discretion. That is what is meant by "a government of laws and not of men."[76]

One cannot fully understand the strengths and shortcomings of Berger's constitutional theory unless one develops the connections between original intention, democracy, and the Rule of Law that are implicit in his writings. This task is necessary because Berger often seems to suggest that only a theory of original intention will uphold the principle of the Rule of Law, which Berger sees as essential to democratic government.[77]

A. Democracy, Original Intention, and the Rule of Law

The Rule of Law requires that laws be predictable, nonretroactive, and equally applicable to all citizens. These qualities distinguish the Rule of Law from the rule of persons. The latter is unjust because it violates the fundamental liberal principle that a person should never be subjected to the arbitrary will of another.[78]

In one sense, democracy itself is in tension with this liberal principle. If the will of the majority rules, it is certainly possible that the majority could subject the minority to its arbitrary will. For example, a majority might decide that the 1,000 richest persons in society should surrender all of their wealth and become slaves to the rest of the populace.

The Rule of Law, the requirement that governmental acts be predictable, generally applicable, and nonretroactive, serves to deter such arbitrary action, but only partially. It prevents, for example, the major-

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[76] R. Berger, supra note 2, at 19-20 (footnotes omitted); see also R. Berger, supra note 7, at 290-91, 329-30.

[77] R. Berger, supra note 2, at 19.

[78] See F. Hayek, The Constitution of Liberty 139-40, 153-61 (1960).

ity from confiscating the property of the 1,000 richest citizens unless there is a rule of general application that authorizes it. However, the majority can circumvent this limitation by passing a law stating that the property of all persons with incomes over a certain amount will be confiscated. Put another way, the requirement of formal equality is substantively empty. Even *Plessy v. Ferguson*[79] is consistent with the Rule of Law in that blacks and whites alike must obey rules requiring segregated facilities. The formal requirement of equality merely demands that like cases be treated alike, not that the result be substantively or procedurally just.

To avoid this problem, liberal democratic theory must supplement the Rule of Law with substantive guarantees of rights, equal treatment, and fair procedure that cannot be violated by democratic majorities. Such a group of rules is given in our Constitution. However, this supplement to the Rule of Law creates a further tension with democracy, since it places certain types of decisions beyond the power of popular majorities to implement.

Even without the aid of these supplementary strategies, however, the Rule of Law prevents at least some types of arbitrary action by those persons charged with application of the law. The requirements of predictability, equality of application, and nonretroactivity allow individuals the opportunity to plan their lives with the knowledge that they are subject only to clearly demarcated restrictions on their behavior. They are to that extent ruled by laws and not by the arbitrary wills of persons.

The practical application of the Rule of Law, however, presents further difficulties. Rules must be applied to concrete factual situations, and this job must necessarily be entrusted to people. The problem is how to prevent the application of laws by individuals from degenerating into the rule of persons. For example, if we entrusted the job of applying the law to the legislature that created it, the legislature might be tempted to change the rule under the guise of application in order to achieve a particular result in a given case. This would violate all three requirements of the Rule of Law—equality of application, predictability, and nonretroactivity. Once again there is a potential tension between democracy and the Rule of Law, and once again liberal democratic theory provides a supplementary solution. The separation of legislative and judicial power is designed to forestall the legislature's temptation to make up the rules as it goes along.[80] The maxim that judges are to interpret law but not make it captures the idea of separation of functions that is intended to

[79] 163 U.S. 537 (1896).

[80] See The Federalist No. 10, at 79 (J. Madison) (C. Rossiter ed. 1961); The Federalist No. 47, at 303 (J. Madison) (C. Rossiter ed. 1961); The Federalist No. 81, at 483-84 (A. Hamilton) (C. Rossiter ed. 1961); R. Berger, supra note 2, at 182-83.

preserve the Rule of Law.[81]

In one sense it is ironic that democracies have entrusted rule application to the judiciary. For judges, both in Great Britain and the United States, have traditionally also been entrusted with the task of creating law through the process of common law adjudication. Such law, although reversible through subsequent legislation, has always been produced without democratic accountability. Thus, the decision to assign the task of interpreting, but not making, law to a group of people whose sole other task is the development of a body of substantive principles heedless of majority will seems wrongheaded in the extreme. Of course, the idea that common law judges do make law was not generally accepted before this century, and the fiction that judges discovered eternal legal principles served to obscure the obvious tension between the tasks of statutory interpretation and common law adjudication.

In any case, the decision to separate legislative and judicial functions and entrust judges with the task of interpretation only shifts the difficulties of rule application to another area. How are we to ensure that judges will not violate the principles of equality of application, predictability, and nonretroactivity as they interpret the law? How will we know that they have not simply changed the law under the guise of interpretation? Such a result would be inconsistent not only with the Rule of Law, but also with the principle of majority rule. To avoid this difficulty, the Rule of Law also requires a theory of adjudication. A theory of adjudication includes: (1) a set of criteria for proper interpretation; (2) a theory of stare decisis to ensure that litigants receive identical interpretations; and (3) a requirement of reasoned decision making to ensure that judges comply with the first two requirements.

Each of these criteria seeks to preserve the goals of equality of application, predictability, and nonretroactivity. A theory of proper interpretation gives determinate meaning to rules, which in turn helps to ensure that like cases will be treated alike. The doctrine of stare decisis guarantees that later cases will be judged according to the same rules as earlier cases, and that persons will have advance warning of the legal consequences of their actions. Finally, the requirement of reasoned decisions helps to avoid arbitrariness and promotes predictability and similarity of treatment.

The significance of Berger's position now becomes apparent. Berger's theory of original intention is a candidate for a theory of proper interpretation within a theory of adjudication, and, I think he would argue, the only theory consistent with the requirements of democracy and the Rule of Law. A theory of original intention avoids uncertainty and

[81] See R. Berger, supra note 2, at 12-13; R. Berger, supra note 14, at 80-87.

arbitrariness and promotes predictability and consistent application. Because the intention of the Founders is ascertainable and does not change over time, it creates the possibility of a single interpretation of the Constitution that can be applied nonarbitrarily and equally in all cases to all citizens.[82]

Moreover, the theory of original intention has a further advantage. Other theories of interpretation might also satisfy the goals of predictability, equality of application, and nonretroactivity, as long as they could establish a single, ascertainable interpretation of legal materials that could be applied in a nonarbitrary fashion. But a theory of original intention, argues Berger, has a greater claim to political legitimacy than any alternative theory. That is because the privileged meaning of the legal text is the meaning understood by the person or persons who had the political authority to create the text in the first place.[83]

In the context of constitutional interpretation, Berger would argue, this additional advantage becomes crucial. The political authority for constitutional supremacy over democratic will stems from a majoritarian act—ratification of the original Constitution and its amendments—which possesses greater political legitimacy than the ordinary exercise of majoritarian power. Because legislatures may not reverse constitutional decisions by simple majority vote, interpretations that diverge from original intention lack the claim to legitimate thwarting of majority will that is available to interpretations consistent with the will of the Ratifiers of the Constitution and its subsequent amendments.[84]

I have presented the connections between original intention, democracy, and the Rule of Law at some length because these connections are more often assumed than stated explicitly in debates about constitutional interpretation. Certainly, one can quibble with the model's relationship to reality, for the process of adjudication is never an exact science. However, far from challenging this model, I intend to take it very seriously indeed. My goal is to show that although original intention seems to provide a privileged meaning to a text, and especially a constitutional text, the model's assumptions guarantee that the Rule of Law cannot be wholly grounded upon such an interpretive theory. In fact, if we take the model seriously, the Rule of Law actually requires that original intention *cannot* be the foundation of constitutional interpretation.

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[82] R. Berger, supra note 2, at 18-19, 184-87; R. Berger, supra note 9, at 290-91, 364-66.

[83] R. Berger, supra note 2, at 16-17.

[84] For the classic statement of this justification of judicial supremacy, see The Federalist No. 78, at 467-68 (A. Hamilton) (C. Rossiter ed. 1961).

B. Synchrony and Diachrony

I begin by considering two different ways of looking at systems of law: the synchronic and the diachronic. A synchronic perspective asks how a legal system operates as a system at a particular moment in time. A diachronic perspective, on the other hand, is historical: it asks how the elements of a system of law develop over time. Synchrony is concerned with law as a self-contained system of rules and principles, while diachrony is concerned with the temporal evolution of particular rules and principles.[85]

The model of the Rule of Law presented above is much more congenial to a synchronic perspective of the legal system than it is to a diachronic perspective. The Rule of Law prescribes that the same set of knowable, predictable rules should apply to all citizens. This ideal is predicated upon a vision of the law as a complete, self-contained system of rules and principles as they might be understood at a particular point in time. Our concern from this perspective is whether A's case was treated according to the same *system of rules* as B's. Moreover, even if B's case occurs at a different time than A's, we still retain a synchronic perspective of the legal system. The Rule of Law requires that for all practical purposes the same system of rights and duties apply to B as to A. In other words, although the system is applied at different times, it remains the same system, so that the difference in time is not relevant to the decision of the case.[86]

Of course, the synchronic perspective is necessarily incomplete, for the corpus of governing rules does change over time, either through the subsequent legislative or administrative promulgation of rules, or through judicial decision. The Rule of Law thus faces a problem of history. Viewed diachronically, a system of law is always evolving, and if the body of legal rules is constantly changing, this presents obvious difficulties of unequal application, unpredictability, and retroactivity.

A system of law can mitigate these problems by requiring that legislation be prospective. In this way, the legal system preserves the synchronic perspective by creating a series of different time slices, in each of which a predictable and nonretroactive set of norms obtains.[87] The legal

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[85] The source of this distinction is Saussure's explanation of different methods of approaching the study of linguistics. F. de Saussure, Course in General Linguistics 81-100 (W. Baskin trans. 1974). Synchrony, as understood by Saussure, is not so much concerned with the issue of simultaneity as it is with language conceived as a complete system, abstracting away the dimension of temporal change.

[86] Similarly, even though languages obviously change over time, a synchronic perspective of language disregards the temporal dimension in order to understand a language as a system.

[87] For a critique of this strategy, and a general discussion of legislative retroactivity, see Eule, Temporal Limits on the Legislative Mandate: Enforcement and Retroactivity, 1987 Am. B. Found. Res. J. 379.

system can also establish a principle of stare decisis, which seeks to ensure that the same principles of decision are applied at different points in time. The latter strategy is also designed to approximate the synchronic ideal of the Rule of Law, for it requires that the principles announced in earlier cases will control later ones, thus preserving the identity of the system over time.

Nevertheless, the problem of history does not entirely vanish, for judicial decisions that create new doctrine are usually not prospective in application. This difficulty can often be avoided only by the metaphysical argument that the decision was somehow immanent in preexisting law, a claim that is more believable in some situations than in others. In any case, this solution also operates by converting a diachronic perspective into a synchronic one—for it rests upon the claim that the principles of decision at the later time were already operative at the earlier time, although not fully articulated.[88]

This problem of history, then, is how to reconcile the synchronic perspective required by the Rule of Law with the diachronic nature of legal change. At first glance, it seems that one avoids the problem only to the extent that one minimizes the diachronic component of law—and thereby ensures that the system of law does not change over time. In fact, however, as I shall now argue, legal evolution is required by the operation of the Rule of Law itself. Put another way, the Rule of Law, which at first glance appeared to be most consistent with a synchronic perspective, has a necessarily diachronic aspect.

C. The Rule of Law and the Rule of Texts

What differentiates the Rule of Law from the rule of persons is the requirement that persons be governed by legal rules created by legislatures and courts. In short, the Rule of Law requires that texts rule us, and not the persons who created those texts.[89] Our Constitution is a legal text, and like any such text, it requires interpretation in order to be understood and applied to particular cases. Moreover, the Rule of Law, at least as practiced in this country, normally requires a judge interpreting the Constitution to give a statement of reasons for her decision.[90] However, under the doctrine of stare decisis, the reading of the Constitu-

[88] Of course, this merely begs the question whether the Rule of Law's ideals of predictability and fair warning have been properly served.

[89] For a more detailed discussion, see Balkin, Deconstructive Practice and Legal Theory, 96 Yale L.J. 743 (1987).

[90] This statement of reasons demonstrates the connection between the resolution of the concrete case and the principles of constitutional law that already exist. A judicial opinion, then, is not only an interpretation of the existing law, but serves as evidence that the judge's decision was the result of an interpretation and not merely the expression of personal predilections.

tion itself becomes part of the corpus of legal precedent, which will then be used to decide succeeding cases.

As a result of this model of adjudication, the Rule of Law produces a continuing series of readings and rereadings of the body of legal materials that are applied successively to each new factual situation. As judges decide cases, their readings become part of the body of constitutional law. This, in turn, becomes the basis for further readings, and so on.[91]

The Constitution and constitutional decisions, as texts, share a property common to all texts. That property is iterability—the ability to be read and understood repeatedly by a variety of different readers in a variety of different contexts.[92] This same property, however, creates the possibility that a text will mean something different to a given reader in a given context than it meant to earlier readers in other contexts, or even to the person who created the text in the first place.[93]

Understanding a text's meaning, or reading it correctly, relies upon notions of the identity and difference of meanings. Understanding a text involves the preservation of its meaning even though it is read at a different time by a different person in a different context. Similarly, misunderstanding or misreading a text involves drawing a meaning other than the one intended by the person who created the text.[94]

However, the principle of iterability means that texts cannot be understood unless they can be misunderstood—cannot be read unless they can be misread. For a text cannot signify unless it can signify regardless of the meaning it had to the person who created it.[95] The publicity of a text is precisely its capacity to break free from an author's private meaning and mean something other than or in addition to the author's private meaning.[96] As a result, even when we understand a text, what we understand is the text and not the author's private meaning. The act of reading a text in a different context guarantees that what is grasped will be

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[91] Of course, judges are not the only persons who engage in readings of the Constitution. There are also the readings of litigants, historians, and legal commentators. These also grow cumulatively over time. They are not, of course, authoritative readings, because they are not entitled to stare decisis effect. However, they may influence judges and other legal decisionmakers at some future point, so that some aspects of these readings may become part of authoritative materials. In fact, at any particular time, there may be an entire tradition of nonauthoritative readings that exist in tandem with the work of judges, and which influence and are in turn influenced by them.

[92] See H. Staten, Wittgenstein and Derrida 22-23 (1984).

[93] See J. Derrida, Margins of Philosophy 315-17 (1982).

[94] See J. Culler, On Deconstruction: Theory and Criticism After Structuralism 176 (1982).

[95] J. Derrida, supra note 93, at 317; H. Staten, supra note 92, at 111-12; Derrida, Limited Inc., a b c . . . , 2 Glyph 162, 200 (1977).

[96] Balkin, supra note 89, at 780. This is especially so, one might think, when the text is itself the joint product of several minds which must create a text that captures their joint understandings.

simultaneously partly the same and partly different from what was meant by the author of the text.[97]

Thus, reading a text is, in a very important sense, a type of misreading—it is a misreading, to use Jonathan Culler's phrase, "whose misses do not matter" too much.[98] Each successive reading or understanding of previous texts is necessarily partial. We grasp certain aspects of the text, and not others, because of our limited vantage point, because of our inaccessibility to the pure presence of thought that created the text, and because of the particular requirements of our context which require only an understanding sufficient for the purposes at hand.[99] Because readings of texts necessarily involve selection and organization of materials, and because the nature and scope of new contexts is impossible to determine in advance, even the best readings may someday be shown to be partial ones. Later readers may find things in a text that previous readers overlooked or distorted. Indeed, Berger's book itself purports to have rediscovered the meaning of a text—the Constitution, along with the texts that constitute the Founders' intentions—that previous readers had missed. "The history of readings is a history of misreadings, though under certain circumstances these misreadings can be and may have been accepted as readings."[100]

D. Misreading and the Constitutional Tradition

We see, then, that the very thing that makes the Rule of Law possible—the iterability of legal texts to decide new cases—creates the possibility for partial or even incorrect readings. It creates the possibility, to use Berger's argument, that Chief Justice Marshall would have misread "commerce among the several states" to mean commerce that concerned more than one state, or that was intermingled with the affairs of more than one state, rather than what Berger believes is the correct reading.[101] Moreover, because of the principle of stare decisis, these incorrect readings become part of the corpus of legal precedents that are read and reread in successive cases. These misreadings in turn spawn other misreadings, which in turn become incorporated in the body of authoritative materials, and so on. The result is that the burgeoning accumulation of materials may move a considerable distance from the "correct" interpretation—in Berger's theory, one that is consistent with the con-

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[97] Derrida makes this point in his famous aphorism that "iterability alters." Derrida, supra note 95, at 200. The very act of repetition differentiates even as it imitates.

[98] J. Culler, supra note 94, at 176.

[99] Nor should we forget the type of partiality that stems from economic interest, political belief, and ideological motivation.

[100] J. Culler, supra note 94, at 176.

[101] See text accompanying notes 21-28 supra.

crete intentions of the Founders.

This is not to suggest that the Rule of Law guarantees that any *particular* misreading will occur. Nor can one claim that a particular decision, whether it be *Gibbons v. Ogden*[102] or *Roe v. Wade*,[103] is legitimate merely because some mistakes are unavoidable. What this argument does claim is that the possibility of misreadings, and misreadings of misreadings is built into the Rule of Law itself. The very factors that allow the Rule of Law to operate over time—the iterability of legal texts in successive legal and factual contexts and the principle of stare decisis—give rise to the structural possibility of misreadings and the resulting enshrinement of those misreadings in succeeding cases. Put another way, the Rule of Law creates the possibility that a particular misreading, like that of the privileges and immunities clause in *The Slaughterhouse Cases*,[104] could become fixed into the law and profoundly influence its future development.

In this sense, constitutional decision making, and indeed legal decision making in general, is much like the party game where each guest whispers a message into the next person's ear, and finally the first and last incarnations of the message are compared. If the Constitution obeys the Rule of Law, it must contain its own possibilities of cumulative misunderstanding, possibilities that are endemic to the Rule of Law.

This logic leads to a second point, perhaps more important then the first. The Rule of Law, diachronically understood, guarantees that the actual process of adjudication over time will have surprisingly little to do with either the text of the Constitution or with the concrete intentions of its Framers.

This seemingly surprising conclusion is confirmed by the everyday experiences of people who debate and discuss the meaning of the Constitution in classrooms, law reviews, courtrooms, and judicial chambers. When a student takes the basic course in constitutional law, she is usually asked to read the Constitution in her first assignment. Yet in succeeding classes, she is unlikely to refer to it much again. Rather, she concerns herself mostly with the successive readings that others—judges, lawyers, and scholars—have made of the text. Similarly, when lawyers and judges argue and decide cases, they do not read the text of the Constitution over and over again, hoping that the right answer will suddenly strike them. Rather, they look to previous case law, treatises, law review articles, historical texts, and other commentaries. The body of constitutional law grows larger every year, and the amount of commentary on

[102] 22 U.S. (9 Wheat.) 1 (1824).
[103] 410 U.S. 113 (1973).
[104] 83 U.S. (16 Wall.) 36 (1872).

the Constitution grows even faster. This is not because the text of the Constitution itself is getting longer, but because the readings of the Constitution—the readings that are actually used to determine what the Constitution itself means—are growing in size and number.

The Rule of Law makes this result inevitable. Because of the iterability of legal texts and the doctrine of stare decisis, the corpus of authoritative materials upon which decisions are based quickly dwarfs the size of the original text of the Constitution. Comparative size, however, is not the real issue. Due to stare decisis, successive readings of the Constitution become guides to proper interpretation in particular factual situations, and spawn further factual distinctions based upon them. As a result, these readings become the paradigmatic sources for understanding particular types of constitutional issues. Hence, if a lawyer is interested in debating the constitutionality of a particular affirmative action plan, she is unlikely to spend her time reading and rereading the words of the fourteenth amendment when she has access to the discussion in *Bakke*[105] and its progeny.

It is misleading, moreover, to assume that successive readings merely apply the same principles to increasing levels of factual specificity. Rather, the body of readings and rereadings creates the theoretical framework in which successive questions are understood and litigated. Consider, for example, the following question that may soon come before the Supreme Court: in a libel suit against a private figure involving a matter of private concern, may the state impose liability without fault and place the burden of persuasion on the issue of truth on the defendant? The answer to this question cannot be divined by reading the text of the first amendment very, very carefully. The vocabulary of this question, the very concepts and distinctions that are used to frame the issue, are the products of previous readings of the first amendment. Thus, the free speech issues presented above rely upon the distinctions and issues created by *Dun & Bradstreet v. Greenmoss Builders*[106] and *Philadelphia Newspapers v. Hepps*,[107] which in turn rely upon the doctrinal framework established in *Gertz v. Robert Welch, Inc.*,[108] which in turn relies on *New York Times v. Sullivan*,[109] which in turn depends upon still earlier readings, and so forth.

Thus, successive readings of authoritative materials do not merely apply old principles to new factual situations. Rather, they add new

[105] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (discussing constitutionality of quota-based medical school affirmative action plan).

[106] 472 U.S. 749 (1985).

[107] 475 U.S. 767 (1986).

[108] 418 U.S. 323 (1974).

[109] 376 U.S. 254 (1964).

principles, policies, theories, and distinctions to the body of materials that we use to discern the meaning of the Constitution. The complicated doctrines that comprise the first amendment's guarantee of free speech and religion, and the intricate web of rules, exceptions, subexceptions, and subsubexceptions that constitute modern fourth amendment search and seizure jurisprudence, are not inherent in the text of the Constitution or even in the intentions of its Framers. Rather, they are the work of cumulative readings and rereadings that attempted to make sense of what had come before. In so doing, these readings created theories and distinctions to deal with the problems created by previous theories and distinctions. The precise contours of these theoretical constructs are not inevitable. What is inevitable is that theories, principles, policies, and distinctions will accumulate and create the framework for understanding new constitutional problems and developing new theories, that will, in turn, set the stage for further conceptual evolution.

Similarly, as history progresses, the vocabulary and structure of constitutional issues become increasingly difficult to articulate in ways that can be answered in terms of the concrete intentions of the Founders. Consider the following issues that were presented to the Supreme Court in the 1987 Term:

1. Is the right to remain silent at trial, guaranteed by *Griffin v. California*,[110] abridged by a prosecutor's commentary on the defendant's refusal to take the stand in his own defense?[111]

2. Do *Miranda* rights apply to convicted defendants in presentence investigations?[112]

3. Does the first amendment guarantee of access to public forums prevent a municipality from prohibiting newspaper vending machines on city streets?[113]

4. Are lawsuits brought under a theory of intentional infliction of emotional distress (a cause of action which did not exist at common law until the late nineteenth century) subject to the restrictions of *New York Times v. Sullivan*[114] and its progeny?[115]

It strains credulity to think that we can even begin to answer these questions in terms of the concrete intentions of the Framers. The reason is simple: the conceptual framework for answering these questions—the vocabulary and principles upon which the very questions asked ulti-

110 380 U.S. 609 (1965).

111 United States v. Robinson, 108 S. Ct. 864 (1988).

112 Vermont v. Cox, 147 Vt. 421, 519 A.2d 1144 (1986), cert. granted, 107 S. Ct. 1283, cert. dismissed, 108 S. Ct. 479 (1987).

113 City of Lakewood v. Plain Dealer Publishing Co., 108 S. Ct. 2138 (1988).

114 376 U.S. 254 (1964).

115 Hustler Magazine, Inc. v. Falwell, 108 S. Ct. 876 (1988).

mately depend—is not based upon the constitutional text and Framers' intentions, but upon previous interpretations of them and interpretations of those interpretations. It is not merely that the intention of the Framers is equivocal on these matters; it is that one cannot even understand these doctrinal questions except as part of a growing constitutional tradition. For this reason, it is always amusing to hear politicians talk about the need to appoint judges who will carry out the intentions of the Framers in criminal procedure cases; for the actual practice of judges is the articulation and development of principles and concepts that are essentially the product of a constitutional tradition of readings and readings of readings.

The process of adjudication, then, is a process of add-judication—of addition and supplementation. Constitutional construction is precisely that—*construction*. Continual readings and rereadings of materials create the framework under which new constitutional questions are raised, analyzed, and answered.[116]

I do not mean to suggest that the content of later readings is conclusively determined by the doctrinal moves made in previous readings. Doctrinal evolution creates as many possibilities for future development as it forecloses. Nor am I claiming that judges do not sometimes limit or even overrule previous precedents. Rather, the point is that the context of the decision of a case is shaped by previous readings even if the subsequent reading is a denial of the previous one, just as an adolescent is shaped by her parents' attitudes even as she consciously rejects them.[117]

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[116] Again, in focusing on authoritative materials, one should not disregard the importance of nonauthoritative readings of the Constitution, such as those of litigants, politicians, historians, and legal scholars. Often the theories and distinctions expressed in a litigant's brief will find their way into a judicial opinion. See, e.g., R. Current, Daniel Webster and the Rise of National Conservatism 32-33 (1955) (discussing influence of Webster's argument in McCulloch v. Maryland on Chief Justice Marshall's opinion). Scholarly readings of the Constitution may influence judges as well. See, e.g., Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1 (1965). Certainly Berger's book is written with the hope that it may have some influence, however slight, on the course of doctrinal development. See R. Berger, supra note 2, at 186-88. Although nonauthoritative readings do not have the force of law and are not perpetuated by stare decisis, they constitute their own tradition, in which various writers and thinkers offer their own and comment upon each others' readings of the Constitution. See Powe, Scholarship and Markets, 56 Geo. Wash. L. Rev. 172 (1987) (discussing history of scholarly ideas about first amendment). Such a tradition of readings also grows over time. It is affected by the work of judges, who create authoritative readings, and it may, at some points in history, intersect with and influence authoritative readings.

[117] For example, even though Brown v. Board of Education, 347 U.S. 483 (1954), overruled the separate but equal doctrine of Plessy v. Ferguson, 163 U.S. 537 (1896), *Brown* preserved *Plessy*'s framing of the doctrinal question: whether dual school systems constituted equal treatment. In so doing, the *Brown* opinion conceptualized the problem of school segregation in terms of the need for equality and not in terms of a substantive right to education, a doctrinal choice that would have severe consequences two decades later in San Antonio Indep. School

If the picture of adjudication I have proposed is correct, successive readers are adding something to the body of constitutional law. They are adding principles, policies, theories, distinctions, syntheses, and vocabulary. Even when they rely upon historical evidence, they are adding something, for history itself is composed of texts that are read (and misread) by successive generations of readers.

Surprisingly, the engine that generates this process of supplementation is the Rule of Law itself, with its concomitant doctrine of stare decisis. If we are ruled by law, we are ruled by texts, and if we are ruled by texts, we are ruled by readings of texts. However, all readings are partial, are "misreadings," in the more general sense described above.[118] They add to and alter what has come before, and in so doing raise new issues which in turn give rise to new readings, and so on. Successive readers of the ever increasing text of constitutional law provide later readers with a vast array of conflicting interpretations in which they will find the bases for their own later interpretations, which will also become part of the dialectical tradition of constitutional interpretation.[119]

Dist. v. Rodriguez, 411 U.S. 1 (1973). In fact, Chief Justice Warren's original draft opinion in the companion case of Bolling v. Sharpe, 347 U.S. 497 (1954), did contemplate a decision based on a due process right to education, but this idea was omitted in later drafts because of the post-1937 antipathy to substantive due process. G. White, Earl Warren, A Public Life 226-27 (1982). As a result, later cases understood *Bolling* to be a decision about the equal protection component of the fifth amendment's due process clause. This result demonstrates not only *Plessy*'s influence on *Brown* and *Bolling* but also that of West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (rejecting substantive due process argument that minimum wage statute for women violated freedom of contract).

Moreover, because *Plessy* dealt with equal treatment by the government—an issue raised in *Plessy* because of legislative separation of the races in railway carriages—*Brown* was not conceptualized in terms of the larger issue of economic equality between blacks and whites in the private sector. Here too, we see how formulations of equal protection in *Plessy* and prior cases, most notably The Civil Rights Cases, 109 U.S. 3 (1883), affected the manner in which *Brown* rejected *Plessy*.

Finally, because *Plessy* saw equal protection as a guarantee of present equal treatment and not as requiring remedial relief for the cumulative effects of prior racial oppression, *Brown*'s rejection of *Plessy* was also phrased in terms of present equal treatment—differences between the races were presumptively suspect. This framework foreclosed for a time, or else made extremely difficult, the notion that equal protection of the laws was consistent with or even required unequal treatment of blacks and whites for remedial purposes, as is necessary in affirmative action programs. The legacy of *Plessy*'s formulation of the issue of equal protection meant that dismantling the cumulative economic effects of racism was at best a permissible governmental goal, and not one required by the Constitution.

118 See notes 89-100 and accompanying text supra.

119 I use the expression "dialectical tradition" because I can think of no single word that combines two very different ideas. Constitutional law is a tradition because it builds upon previous readings. To enter into that tradition is to become familiar with the types of doctrinal and rhetorical moves that are historically associated with the subject. However, the word "tradition" has the unfortunate connotation of solidity and fixity; it implies a history that speaks with only one voice. Rather, the American constitutional tradition is a series of conflicting principles and visions. It is a mixture of different voices which never achieve complete

We began by noting that a static conception of the law, a synchronic vision, was most amenable to the ideals of the Rule of Law, and that in order to preserve these ideals we had to devise strategies, such as the doctrine of stare decisis, that minimize the diachronic aspect of legal systems. We now see that the diachronic aspect of a system of law, its capacity for change and evolution, is *required* by the Rule of Law itself. The Rule of Law's synchronic aspect—its understanding of law as a self-contained system of rules—commands us to apply the identical legal materials repeatedly over time. Yet our very attempt to apply the Rule of Law over time creates the possibility of the cumulative evolution of legal norms through the doctrine of stare decisis. Indeed, in the same way that we can assert that a text cannot be understood unless it can be misunderstood repeatedly, we can state that the Rule of Law cannot operate over time unless the content of legal norms can be altered repeatedly. We arrive at the curious result that the synchronic perspective of legal systems upon which the Rule of Law is grounded actually depends to some degree upon the diachronic perspective. The ideals of the Rule of Law depend upon the very thing that they deny—change, unpredictability, and retroactivity.

E. Misreading and Interpretive Theory

This vision of adjudication has a further, and even more significant consequence. Even if we could agree that at the moment of the ratification of the Constitution there was a correct method of constitutional interpretation based solely upon the text and the concrete intentions of the Framers and Ratifiers, the Rule of Law guarantees that the correct standards for constitutional interpretation will change over time.

We have seen that the Rule of Law creates the structural possibility of cumulative "misunderstandings," in the special sense of that word described above.[120] Indeed, as I have argued, if we take seriously the partiality of all readings and the cumulative effects of this partiality, there is hardly any portion of the authoritative materials that will not come in time to enshrine some aspects of "misunderstanding" or "misreading." As a result, large segments of these materials may come to be inconsistent with original intention.[121]

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homogeneity or resolution. Moreover, the content of the tradition is always subject to revision by later participants. Thus, I add the adjective "dialectical" to convey the contested and evolving nature of the tradition. Joseph Lukinsky has conveyed a similar idea in his imaginative comparison of constitutional law to the study of Talmud, which he calls a "deliberative tradition." See Lukinsky, Law in Education: A Reminiscence with Some Footnotes to Robert Cover's Nomos and Narrative, 96 Yale L.J. 1836, 1838-48 (1987).

[120] See notes 89-100 and accompanying text supra.

[121] Note that I say only a large segment of the materials, and not all, for it is important not to overstate the case. "Misunderstandings" encompass not only obvious mistakes that con-

If the structural possibility of cumulative misreading is inherent in the Rule of Law, what effect does this have on the standards for correct interpretation? We have, I think, three choices. First, we can hold fast to our original principles, and overturn all of the readings inconsistent with original intention, regardless of the consequences to settled expectations. By this approach, we preserve our original theory of correct interpretation. Second, we can admit that the principle of stare decisis and the requirements of the Rule of Law—predictability, nonretroactivity, and equality of application—have forced us to accept all of our present readings as authoritative, even if not "correct" in our original sense. We thus bootstrap ourselves into the conclusion that all of our misreadings are correct. In that case, the standards of correct interpretation must have changed, since they have produced decisions that are inconsistent with the original theory of correct interpretation.

What is important to note about these two alternatives is their attempt to restore the synchronic perspective of Rule of Law ideals. For within this perspective, the Rule of Law requires that the standards for interpreting the governing rules meet the same criteria of predictability and consistency as the rules themselves. These two solutions achieve this goal in opposite ways. The first retains the original standards for interpretation only by disregarding the cumulative effects of stare decisis; it thus violates the Rule of Law in order to preserve it. The second solution retains the existing body of constitutional doctrine—thus preserving predictability, equality, and nonretroactivity—but only at the cost of altering the standards of correct interpretation. It too, violates the Rule of Law in order to preserve it.

Moreover, each solution is only temporary. As soon as the synchronic ideal is reestablished, the process of cumulative misreadings begins anew. Thus, the first solution requires that we continue to sweep away existing precedents as time progresses. Our temporary sacrifice of Rule of Law ideals turns out to be permanent, as an ever growing set of expectations based upon misreadings must be dashed repeatedly, and stare decisis begins to lose its force.

The second solution suffers from the opposite vice. As soon as we have accepted the status quo as the proper interpretation, the status quo begins to alter. Once again, our temporary separation from Rule of Law

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taminate later decisions, but also the partially correct readings that are inevitable in any sustained judicial practice, and that also bear progeny. These partial "misunderstandings" include readings based upon the mass of new concepts, principles, theories, and distinctions that were not inherent in the original materials of text and concrete intentions, but became part of the constitutional tradition through cumulative readings and rereadings. Thus not all misreadings necessarily produce results inconsistent with original intention, although the cumulative effect of misreadings may well do so over time.

principles has led to a permanent divorce. Continual bootstrapping requires a continually changing standard of correct interpretation, and moreover, one that never disappoints. We preserve stare decisis only by abandoning any hope of a consistent, coherent theory of correct interpretation. Ultimately, we find ourselves incapable of separating what is from what ought to be. In both the first solution and the second, we arrive at the same conclusion: the attempt to preserve the synchronic ideal proves ultimately unstable. The more we banish the diachronic perspective, the more insistently it comes back to haunt us.

A third alternative to the problem of history, and I think the alternative that most constitutional scholars today would choose, would be to argue that we should preserve and even extend some "misinterpretations"—such as *Brown v. Board of Education*[122]—but that no such deference should be given to others, even though they are the result of the same adjudicative processes. That is to say, we would retain original intention as an element of interpretation while denying it a determinative role. Thus, we might retain the present understanding of the commerce clause while keeping alive the possibility that we might someday return to an earlier understanding of, say, the eleventh amendment or Congress's war-making powers.

Note, however, that if we adopt this approach, the original standards of "correctness" *cannot* determine which misreadings to accept and which to reject, for, by hypothesis, *all* such interpretations are misinterpretations. Thus, we must develop a revised vision of correct interpretation that differs from the original theory in that it allows us to choose between misinterpretations. This means that the theory of correct interpretation must have changed over time, just as the content of the body of legal doctrine to be interpreted changes over time.

In this sense, the third solution reaches the same conclusion as the second—that the process of adjudication changes our view of the correct standards for adjudication. It differs, however, in an important respect. Even if our standards of interpretation must change over time, it does not follow that the presently existing body of doctrine is correct under that standard of interpretation. This approach envisions a dialectical relationship between the evolving standards of proper interpretation and the evolving corpus of readings of the Constitution. It preserves the possibility that *Brown v. Board of Education* is correct while *McCleskey v. Kemp*[123] is mistaken, that *Griswold v. Connecticut* [124] is consistent with

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[122] 347 U.S. 483 (1954).

[123] 481 U.S. 279 (1987) (rejecting challenge to Georgia death penalty based on statistical evidence that racial considerations affected capital sentencing decisions).

[124] 381 U.S. 479 (1965).

correct standards of interpretation and *Bowers v. Hardwick*[125] is inconsistent.

This solution to the problem of history uses the results of misreadings as a guide for constructing a theory of interpretation. This theory is both derived from constitutional practice and opposed to it. It requires us to participate in the ongoing dialectical tradition of constitutional law, identifying those aspects of it which are worthy of perpetuation and those which must be discarded. The fact that standards of correct interpretation have changed, and will continue to change, however, does not mean that we are left to our own devices with no guidance whatsoever. There are already rich sources of moral and political principles to be garnered from existing readings of the Constitution. What constitutes a correct interpretation of the Constitution will then become the result of moral and political debate *within* the framework of the constitutional tradition itself, a tradition that develops even as one finds oneself within it and living through it.

This solution to the problem of history is neither new nor revolutionary. I believe that it is the ordinary everyday practice of constitutional law, self-consciously considered. It is a solution whose precise contours must differ for each constitutional theorist. More important, however, it accepts the necessarily diachronic nature of a legal system. As the body of authoritative materials changes over time, so do the standards for correct interpretation. However, the evolving body of materials is never completely consistent with those developing standards, and each evolves partly in reaction to the other. At any point in time, then, the law can at best adhere only partly to the synchronic ideals of the Rule of Law. Instead of favoring the synchronic aspects of legal systems over the diachronic, we must recognize their mutual dependence.

IV

RAOUL BERGER AND THE PROBLEM OF HISTORY

Using the results of previous misreadings as the basis for constructing theories of constitutional interpretation is clearly anathema to Berger. He has argued quite forcefully that one cannot base a legitimate theory of constitutional interpretation on preserving the results of particular cases, like *Brown v. Board of Education*.[126] This leads us, however, to ask exactly what is Berger's alternative solution to the problem of history. Berger's discussion of the issue in *Federalism* is very sparse indeed:

> Intellectual honesty constrains me to be prepared to overrule all decisions that departed from the original design, just as *Erie Railway Co. v.*

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125 478 U.S. 186 (1986).

126 See R. Berger, supra note 2, at 180-82.

> *Tompkins* unsparingly overruled the century old doctrine of *Swift v. Tyson*, so deeply embedded in past judicial practice. . . .
>
> But while decisions can be overruled, past events are not so easily undone. Like poured concrete, they have hardened, so that overruling decisions cannot restore the status quo ante. "The past," the Court observed, "cannot always be erased by a new judicial decision," though it would not rock American society to overrule such departures as the [requirement of a minimum wage for a] janitor, [regulation of] the farmer's production for use [in *Wickard v. Filburn*,[127]], and like cases. But to accept uneraseable ends on practical grounds is *not to condone continued employment of unlawful means.* The practical difficulty of a rollback cannot excuse the *continuation*, the ever-expanding resort to such unconstitutional practices. "Go and sin no more" does not signify acceptance of illegitimate acts, but counsels, rather, do not continue to apply unconstitutional doctrine in ever expanding fashion.[128]

Berger's great failing as a constitutional theorist, as opposed to as an historian, has been his inability or unwillingness to pursue this logic to its conclusion. For all of his rhetoric about cleaving to the facts, wherever they may lead us, he has not explained how it is possible to construct a practical theory of constitutional adjudication from his theoretical views.[129] What is perhaps most distressing is that the passage quoted above appears to be the most extended discussion he has ever given the matter, and it consists of little more than quotations from previous replies to critics strung together.[130]

Berger's concentration on getting the historical facts right has diverted his attention from the practical consequences of those facts. If there is no logically coherent method of putting his ideas into practice, we are likely to greet each new book he writes with a shrug of the shoulders and a distracted "so what?" Thus, Berger does face a problem of history, a problem he has neglected in all of his writings. If we took seriously his theory of constitutional law—that no decision is legitimate unless it is consistent with the concrete intentions of the Framers and Ratifiers—could we perform the everyday practice of constitutional adjudication in this country? Or has history made his theory of adjudication an impossible one?

The sections that follow are an attempt at constructing a practical

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127 317 U.S. 111 (1942).

128 R. Berger, supra note 2, at 179-80 (footnotes omitted).

129 See Berger, supra note 42, at 5 ("I have never professed to formulate a general theory of interpretation; my focus has been quite narrow—a clear expression of intention by draftsmen must be given effect.").

130 See Berger, Debunker's Rampage, supra note 11, at 30; Berger, supra note 17, at 486-87; R. Berger, supra note 14, at 82-83 n.29; Berger, Youthful Omniscience, supra note 11, at 217; Berger, The Fourteenth Amendment: Light from the Fifteenth, 74 Nw. U.L. Rev. 311, 364 (1979).

theory of adjudication from the few scraps of thought Berger has given us. My ultimate conclusion is that Berger cannot provide us with such a theory. Indeed, I conclude that both practical and theoretical considerations drive us inexorably back to the solution that I have offered.[131] However, if my pessimistic analysis looks like the construction of a straw man, it is due to Berger's own failure to provide us with anything other than the scrawniest of stalks.

A. Original Intention Taken Seriously

The most obvious method of applying Berger's ideas to present constitutional problems is the one Berger appears to suggest in his most strident passages: the Court should overrule all precedents that are inconsistent with the concrete intentions of the Framers and Ratifiers. This is the strongest version of original intention theory, and its solution to the problem of history is to deny that history is a problem.

To understand the practical effect of this theory, consider what it would require the Court to do with *Brown v. Board of Education*.[132] As soon as a proper case is presented, the Court would simply announce that *Brown* is now overruled.[133] In that case, consent decrees based upon *Brown* might survive as contractual agreements, and adjudications between particular parties based upon *Brown* might survive as res judicata. However, if a state or federal government then wished to segregate on the basis of race, it would be permitted to do so, and subsequent court challenges based upon the fourteenth amendment would fail.

Similar consequences would ensue if *United States v. Darby*[134] and its progeny were overruled. Although particular attacks on the constitutionality of the food and drug laws, or wage and labor regulations would be res judicata as to the original parties, other litigants would be free to raise constitutional attacks on the grounds that, as to them, the regulations were beyond the power of Congress to enact. Presumably, therefore, a new generation of litigants could well overturn most of the national economic regulation of the post-New Deal period, including labor, securities, food and drug, occupational safety and health, banking and finance, and civil rights laws. Most people would no doubt consider these results disastrous; however, under this strongest version of Berger's

131 See text accompanying notes 122-25 supra.

132 347 U.S. 483 (1954).

133 See Berger, Debunker's Rampage, supra note 11, at 30 ("I would unhesitatingly overrule *Brown*; for it is an 'unconstitutional' decision, reversing the Framers' determination to exclude segregation [from the ambit of the fourteenth amendment]."); Berger, Youthful Omniscience, supra note 11, at 217 ("Nevertheless, if honest analysis will be promoted, by all means let *Brown* be overruled, for it is illegitimate because it is in contradiction of the framers' *clearly* expressed intention . . . .").

134 312 U.S. 100 (1941).

theory, that is simply our misfortune. After all, since all of these laws were beyond the power of the Congress to enact, the sooner their enforcement is ended, the better for the health and safety of constitutional government.[135]

It should be apparent that this method of restoring original intention is really the first type of solution to the problem of history described above.[136] For Berger, there is a privileged system of unchanging constitutional norms embodied in the text of the Constitution and supplemented by the intentions of the Framers and Ratifiers. Berger is attempting to wipe away the encrustations of historical development and restore the earlier, synchronic perspective.[137] In so doing, he must violate Rule of Law principles—wrenching us away from our settled expectations as to the content and course of development of constitutional law, so that he can reassert the previous system.

Ironically, then, this version of original intention theory, which seems most determined to restore the correct foundations of constitutional government, also seems the most radical and disruptive. Regardless of whether this theory will ultimately win the hearts and minds of academics, I venture to suggest that very few persons who work with the law every day would give it serious consideration. The reason, to be blunt, is that such a theory is its own *reductio ad absurdum*. As Judge Bork noted at his confirmation hearings, there is strong evidence that the Founders did not intend to allow the government to issue paper money, which, as everyone knows, is the surest means of debauching the currency and bringing a nation to ruin.[138] If one takes Berger's theory of original intention seriously, all of our paper money is of dubious constitutionality.[139]

Here we see the essential difference between Berger's importance as a historian and his relevance as a constitutional theorist. Berger's constitutional theory, taken in its most uncompromising form, gives us no way to distinguish between school segregation and paper money, between the constitutionality of death penalties and the unconstitutionality of federal

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135 See Berger, Debunker's Rampage, supra note 11, at 30 ("For me the integrity of the Constitution has long risen above any result deemed desirable. Like the other branches, the Court may not act in derogation of the Constitution, no matter how irreproachable its motive.").

136 See text accompanying notes 121-22 supra.

137 R. Berger, supra note 2, at 4 & n.5.

138 See Dam, The Legal Tender Cases, 1981 S. Ct. Rev. 367, 382-90; text accompanying note 1 supra.

139 Indeed, one waits for Berger to write his next book on the Legal Tender Cases entitled "Hard Currency: The Founders' Design." I suspect that such a book will never be written, because it would in itself be the strongest argument against employing Berger's theory of original intention in constitutional cases.

antitrust laws. If the power to issue bills of credit as legal tender and the power to create a national bank were both intended to be beyond Congress's powers, then they remain so, and no amount of wishful thinking or economic hardship will change matters. The curious result of this logic is that each new book Berger writes showing us how far we have strayed from the concrete intentions of the Founders tends to make this strongest form of original intention theory more and more objectionable. Ironically, then, the more history Berger writes, the more irrelevant he becomes as a constitutional theorist.

Berger is fond of quoting Confucius's warning that " 'he who thinks the old embankments useless and destroys them, is sure to suffer the desolation caused by overflowing water.' "[140] Although Berger asserts this maxim as an argument for hewing to original intention, Confucius's words actually deconstruct this theory of constitutional interpretation. To continue the metaphor, the Framers were not the only ones who built embankments. *Brown v. Board of Education*[141] and *United States v. Darby*[142] are also foundations or embankments of their own kind. Indeed, as I have argued above,[143] the diachronic characteristics of constitutional adjudication create the means by which such new embankments are built. To paraphrase the philosopher Otto Neurath, the Rule of Law requires us to dismantle our old embankments and rebuild them piece by piece while still holding back the waters.[144] Confucius's advice thus becomes as applicable to Berger as it is to us: he who would sweep away the embankments of modern constitutional doctrine may well encounter the desolation produced by the waters of racial strife, social injustice, and economic disaster. A person so concerned with foundations might think twice before assaulting the foundations of modern American society.

B. Limitation of Activist Decisions to Their Facts

A complete rejection of past precedent is unthinkable, and even Berger himself does not always take the strident tone described above.[145] Berger usually denies that he would compromise the principle of original intention in any form, but occasionally his remarks suggest a slightly different strategy, more attuned to institutional realities.[146] In any case,

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140 See, e.g., R. Berger, supra note 2, at 192 (quoting W. Durant, Our Oriental Heritage 673 (1954)).

141 347 U.S. 483 (1954).

142 312 U.S. 100 (1941).

143 See notes 104-20 and accompanying text supra.

144 See G. Romanos, Quine and Analytic Philosophy: The Language of Language 25 (1983).

145 See note 133 supra.

146 See R. Berger, supra note 2, at 187-88; Berger, Youthful Omniscience, supra note 11, at 217.

even if Berger himself would not approve of a weaker version of his original intention theory, it is important to consider whether any such theory can operate successfully while preserving the claims to legitimacy enjoyed by Berger's strict originalism.

One possibility is suggested by Berger's remark that "[o]verruling [*Brown*] need not be express; in the history of the Court many a decision has been overruled sub silentio, left to wither on the vine."[147] Similarly, he argues in the present book that "[t]he practical difficulty of a rollback cannot excuse the *continuation*, the ever-expanding resort to . . . unconstitutional practices. 'Go and sin no more' . . . counsels . . . do not continue to apply unconstitutional doctrine in ever-expanding fashion."[148] Elsewhere, Berger argues that "it is to be hoped, at least, that the historical facts may lead the court to curtail its increasing intrusion into the States' internal affairs."[149]

One way to achieve this goal would be to limit all activist[150] decisions to their facts. Thus, although *Brown* would outlaw segregation in schools, other types of segregated facilities would be constitutional unless the precise issue had been litigated. Similarly, the federal government would have the power to regulate interstate commerce with respect to those areas it currently deals with, but it would be forbidden to regulate new areas. Comprehensive federal AIDS legislation would be judged according to the standards of original intention because the federal government had not previously been told that it could constitutionally deal with this type of situation. Although the federal government could continue to ban race, sex, and age discrimination under decisions already rendered, it could not use *Heart of Atlanta Motel, Inc. v. United States*[151] or *Katzenbach v. McClung*[152] to pass additional antidiscrimination legislation, whether by creating new categories of forbidden classifications or extending existing bans to other sectors of the national economy. Similarly, the federal government would be powerless to amend the securities laws to deal with the technological advances in arbitrage thought to be responsible for the recent stock market crash, although present regulations might retain their constitutionality.[153]

The major drawback of this approach is its complete lack of princi-

147 Berger, Youthful Omniscience, supra note 11, at 217.

148 R. Berger, supra note 2, at 180.

149 Id. at 187-88.

150 By "activist," Berger means inconsistent with original intention. See Berger, G. Edward White's Apology for Judicial Activism, supra note 16, at 369-70 & n.23. When Berger uses the term, it is usually not intended as a compliment.

151 379 U.S. 241 (1964).

152 384 U.S. 651 (1966).

153 Moreover, to the extent that an existing regulation or piece of legislation had not been specifically tested in court, it would be vulnerable to attack.

ple. This is not to claim that the present corpus of constitutional doctrine is thoroughly principled, or even that it could become so with sufficient effort. Nevertheless, constitutional law must at least strive for coherence—judges must attempt to understand case law as the result of an interaction of general principles outlined in previous cases. Indeed, we are likely to decry as illegitimate precisely those decisions that cannot be reconciled with general principles of constitutional law developed in previous cases. Confining all activist decisions of the Supreme Court to their facts makes a shambles of the principled nature of constitutional decision making. It is antithetical to the Rule of Law's command that like cases be treated alike.

One might try to avoid this problem by using a more generous reading of "limitation to facts." Thus, national AIDS legislation might be permissible because other types of health regulations have been accepted. New securities regulations might be permissible because one might abstract from the particular regulations upheld by the Supreme Court to justify the general type of regulation that had been authorized in the past. Such a strategy suffers from precisely the opposite defect as the previous one. Rather than making it impossible to provide principled justifications of federal power, this strategy is so manipulable that it is unclear what, if any, usurpations would be condemned by it. For example, consider antidiscrimination laws. What is the general "type" of regulation authorized by *Heart of Atlanta Motel*[154] and *Katzenbach v. McClung*?[155] Would the extension of Title VII[156] to employers with fewer than five employees be authorized? What about the extension of the Age Discrimination Act[157] to persons over thirty-five years of age? What about a new antidiscrimination act to protect homosexuals? Depending upon one's description of the principle that has been settled by the previous cases, confining decisions to their facts may prove to be no confinement at all. Under this analysis, the theory of original intention would offer few if any restraints upon adjudication. Moreover, it would sanction and encourage judicial activism in precisely those areas that have previously been subjected to the greatest judicial lawlessness.

Finally, one should be very suspicious, under this strategy, about which doctrines will get treated more generously than others. If very few situations prove to be of the "same type" as *Roe v. Wade*[158] and *Griswold v. Connecticut*,[159] and very many are analogous to *Wickard v.*

154 379 U.S. 241 (1964).
155 384 U.S. 651 (1966).
156 42 U.S.C. §§ 2000e-2000e-17 (1982).
157 42 U.S.C. § 6102 (1982).
158 410 U.S. 113 (1973).
159 381 U.S. 479 (1965).

Filburn[160] and *NLRB v. Jones & Laughlin Steel Corp.*,[161] one wonders whether this is a requirement of original intention and the need for principled decision making, or rather the result of the political predilections of the academic or judge who is making the argument. Of course, we could arrive at these results under a nonoriginalist theory of interpretation, but at that point we would have conceded that the process of adjudication had changed the appropriate standards for interpretation.

C. *Narrow Readings of Cases Inconsistent with Original Intention*

Similar problems haunt us if we argue, as Judge Bork did during his confirmation hearings, that one should not confine activist decisions to their facts, but simply read them narrowly. In fact, this strategy is not too different from the last one, and the difficulty should by now be familiar. The theory of original intention gives us no basis to pick and choose which activist cases are to be read narrowly or expansively, because if all such cases are mistakes, they all must be read as narrowly as possible.

Of course, one might argue that there are some types of mistakes the Framers would find more disturbing than others, and perhaps this would serve as a guide to which doctrines should be read most narrowly. But this theory leads us to a troubling metaphysical question. Which aspects of constitutional government were the Framers most interested in preserving? Was the coinage clause more important than the import-export clause, and were either or both more important than the clause requiring the presentment of legislative acts to the President? This sort of hypothetical question is much more speculative than the question of the Framers' concrete intentions. What makes matters worse is that there is no one group of Framers whose relative interests are to be consulted. I have no way even to begin to answer the question whether the preservation of state police powers demarcated by the commerce clause and the tenth amendment was more important to the Framers of 1787 than the preservation of segregated schools and noninterference with suffrage was to the Framers of 1868.

In any case, even if one were to engage in such an enterprise, I doubt seriously whether most originalists would be pleased with the results. For example, I strongly suspect that people of Madison and Jefferson's generation would find *Wickard v. Filburn*[162] and *Knox v. Lee*[163] much more disturbing than that great bogeyman of modern activism, *Griswold v. Connecticut*.[164] The reason is simple. The greatest fear of the Ratifiers

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160 317 U.S. 111 (1942).
161 301 U.S. 1 (1937).
162 317 U.S. 111 (1942).
163 79 U.S. (12 Wall.) 457 (1871) (upholding constitutionality of legal tender legislation).
164 381 U.S. 479 (1965). For this point I am indebted to my colleague Joan Mahoney.

was a tyrannical federal government that would invade the rights of individuals. It may be true that *Griswold* and its progeny gave individuals more protection from state action than the Framers would have thought necessary. Still, if these decisions are errors, they err on the side of individual privacy.[165] In contrast, modern commerce clause doctrine raises the specter of an all powerful federal government overshadowing the regulatory powers of the states. Indeed, this is precisely the point that Berger makes in his book. Thus, under this line of reasoning, the narrowest readings of precedent should be reserved for precisely those cases that both modern liberals and conservatives agree should not be narrowly read.

The second problem with this strategy follows from the first. The Bork confirmation hearings made it abundantly clear that, in the name of original intention, Judge Bork would read first amendment and race and sex discrimination cases much more narrowly than he would commerce clause cases or cases expanding the scope of presidential authority,[166] and that the reasons for the difference in "narrowness" had not a thing to do with original intention. Admittedly, there is an irresistible temptation to give "narrow readings" to cases consistent with your political views that are in fact much less narrow than the "narrow readings" you give other cases. However, the theory of original intention cannot provide a principled reason for such differential treatment. Unless we read all activist decisions equally narrowly, we must admit that our theory of correct constitutional interpretation has been altered by history.

D. Abstract Intentions Strictly Obeyed

As a third strategy, we might ignore concrete intentions and look at more abstract intentions. For example, instead of asking whether the Founders would have considered federal minimum wage legislation for elementary school janitors as within the federal government's powers under the commerce clause, we might judge such legislation according to the more general purpose of the commerce power: to legislate where a national economic policy is necessary. Similarly, instead of asking whether the Framers of the fourteenth amendment would have objected to the application of the equal protection clause to women, we might consider their general commitment to equality.

Although this strategy seems more sophisticated, it merely presents

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165 For a discussion of the connections between limited government, natural law, and individual liberty in the thought of the Founders, see Sherry, The Founders' Unwritten Constitution, 54 U. Chi. L. Rev. 1127 (1987).

166 Compare Bork Hearings, supra note 1, at 2259-64 (criticizing cases expanding first amendment and equal protection doctrine) with id. at 2269 (criticizing statutes restricting presidential prerogatives).

old problems in new forms. We must determine at what level of generality to draw our abstract purposes. This is problematic for two reasons. First, by varying the level of generality, one can describe the Founders' purposes in many different ways leading to many different results. Some of these results will be consistent with concrete intentions, while others may be quite inconsistent. For example, under the broadest reading of the purposes behind the equal protection clause, original intention might offer very little constraint at all. More importantly, the theory of original intention itself gives no guide as to how broadly or narrowly to construe abstract intention. Nor does it give any explanation as to why a more abstract level of intention applies to some cases but not to others.[167]

The second difficulty is not that the constitutional text yields a series of more and more general purposes, but that it often reflects a set of conflicting purposes. For example, in the commerce clause area, it is no doubt true that federal power to legislate where the states were severally incompetent was a general purpose. However, as Berger has taken great pains to remind us, limiting this power to interstate commerce also reflected a general purpose to preserve the inviolability of state sovereignty. The more generously we adopt the first purpose, the more lip service we shall end up paying to the second, and vice versa. Once again, Berger's theory of original intention by itself gives us no way of deciding the relative weight to be given to these conflicting abstract purposes.[168]

E. Abandoning Original Intention as a Foundational Justification

The recurring problem in all of the weakened versions of original intention theory is that such arguments are inconsistent with the theory of political legitimacy that justifies the doctrine of original intention in its strongest form. Again and again, we are brought to the conclusion that the theory of adjudication underlying the Constitution has been altered by the process of adjudication itself. The obvious solution to this problem is simply to renounce original intention as the foundation of constitutional interpretation. Moreover, this renunciation is actually necessary to preserve the legitimacy of original intention in constitutional argument.

This position may at first seem paradoxical. However, it follows from the previous arguments about interpretation and the Rule of Law. If the only realistic theory of interpretation is one that rejects a thor-

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[167] See Berger, supra note 42, at 7.

[168] Of course, if all of the previous strategies fail us, a final possibility is that we apply original intention selectively. At this point we are not too far from the mainstream of modern constitutional thought, but we have clearly abandoned originalism. Nothing in the theory of original intent explains why concrete intentions are to be obeyed in some areas of doctrine but not in others.

oughgoing originalism, we are left with the embarrassing question of why original intention should ever be controlling in constitutional argument. It cannot be that original intention is authoritative because of the traditional justifications offered by Berger, for that theory only justifies complete originalism. Indeed, as we have seen, any weakening of originalism robs the enterprise of its legitimacy under Berger's theory. Hence, recourse to original intention must be justified on grounds other than Berger's, and it must be justified by means of a theory that explains why original intention is persuasive in some cases and not in others. It must be a theory that reduces to questions of original intention only in special cases, much as Einstein's theory of physics reduces to Newton's at low velocities.

In reaching this conclusion, however, I come to praise original intention, and not to bury it. Original intention can remain part of a larger theory of constitutional interpretation without threatening to make all other parts of the theory illegitimate.[169] To do this, however, we must alter our perspectives. We must resist the charms of the synchronic perspective, for it leads us to the sort of dilemmas outlined above, and leaven it with the diachronic. We must come to grips with the fact that most debate in constitutional cases does not center around original intention, but the application of concepts and principles derived from precedent—especially recent precedent. We must accept that constitutional issues are created and framed by historical understanding and misunderstanding, and that we have built new foundations out of the old.

Conversely, we must discard our belief in a Golden Age of constitu-

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[169] Here I concur, although for different reasons, with Professor McConnell's judgment that "[t]he biggest disappointment in The Founders' Design is that it ignores the intellectual case for federalism." McConnell, Federalism: Evaluating the Founders' Design, 54 U. Chi. L. Rev. 1484, 1491 (1987) (book review). One searches in vain in Berger's book for any sustained attempt at understanding the role that federalism was to play in the Founders' general philosophies of government. Yet if we are to value the original intentions of the Founders in a modern theory of constitutional interpretation, we must understand why the Founders valued decentralization. We cannot be content merely to parrot their concrete understandings of what decentralization entailed. If they believed that federalism promoted individual liberty, deliberative democracy, or civic virtue, id. at 1500-11, we must ask how these values can be achieved in today's society. It may well be that doctrinal avenues other than federalism are the proper method of realizing those values. See, e.g., Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29 (1985) (suggesting that Framers' interest in deliberative democracy might be aided by heightened rationality review and reform of administrative process).

Professor Sunstein's example demonstrates the difference between an "originalist" theory that appeals to abstract intentions and a nonoriginalist theory that nevertheless expresses an interest in the Founders' philosophies of government. For if we were only interested in abstract intentions, our concern would be how to achieve the abstract goals of federalism through interpretation of the particular clauses that the Framers designed for balancing federal and state power, such as the commerce clause and the tenth amendment. Moreover, those abstract intentions would presumably be conclusive rather than merely persuasive.

tional understanding, our belief in a magical moment in 1787 that represents the true source of all constitutional wisdom—an ultimate moment of grace from which we have all fallen. For that Golden Age has never existed. If the meaning of the Constitution is contested now, if the tradition of constitutional law has been a series of misreadings and misreadings of misreadings, it is because there never was a time at which our understanding of the Constitution was complete, impartial, and transcendently present to ourselves. Our constitutional tradition can only supplement the text and intentions of the Framers because that text and those intentions were already, also, and always equivocal. The magical moment of transcendental comprehension has always escaped us, has never been present to us—indeed, has never existed at all.

Thus, we must recognize that the source of authority for constitutional decision making is not a privileged system of norms existing at a particular point in time, like the intentions of the Framers. The authority for constitutional decision making must come instead from the constitutional tradition itself, of which original understandings form only a small part. Admittedly, this tradition is dialectical. It is a bewildering collection of conflicting purposes and principles. Nevertheless, it is the only source of authority congruent with the diachronic perspective, because it is the only source that evolves over time.[170]

We are brought at last to the great irony in all of Berger's historical work. Berger's goal has always been to show us how far we have strayed from the true meaning of the Constitution, a set of understandings conceived at a particular moment in history—the moment of ratification. His vision of constitutional principle, in this sense, is essentially synchronic. As Berger says, "what the Constitution meant when it left the hands of the Founders it means today."[171] It is a pure, self-contained system of understandings, impervious to alteration or supplementation. No intervening events—whether they include the Civil War, the Industrial Revolution, or the Great Depression—can alter the true sense of the Constitution, or the true principles of constitutional law. Here, then, is the supreme irony of Berger's life and work: we are presented with a scholar who has devoted his entire academic life to history in order to establish an ahistorical view of constitutional interpretation.

The irony, however, works in both directions. If Berger has clung to history in order to avoid the diachronic nature of constitutional law, we

[170] Moreover, the constitutional tradition does not exist in a vacuum. It is dialectically related to popular will, which is the ultimate source of its conflicting values. For an imaginative explanation of some of the connections between popular will and an evolving constitutional tradition, see Ackerman, Transformative Appointments, 101 Harv. L. Rev. 1164 (1988); Ackerman, The Storrs Lectures: Discovering the Constitution, 93 Yale L.J. 1013 (1984).

[171] R. Berger, supra note 2, at 18-19.

have rejected Berger's history because we know that the meaning of the Constitution is essentially historical—that it is a meaning which works itself out through history. Berger must arm himself with history in order to defeat history; we must displace history in order to build upon it.